



## Santa Clara Law Review

Volume 29 | Number 2

Article 8

1-1-1989

# Book Review [Wrongful Employment Termination Practice]

Santa Clara Law Review

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### Recommended Citation

Santa Clara Law Review, Book Review, *Book Review [Wrongful Employment Termination Practice]*, 29 SANTA CLARA L. REV. 489 (1989).

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## BOOK REVIEW

WRONGFUL EMPLOYMENT TERMINATION PRACTICE, consulting editors, Guy T. Saperstein, B. Scott Silverman. California Continuing Education of the Bar. 1988. Pp 923. Hard cover. \$95.00.

*Reviewed by John Neil McNicholas\**

When Daniel Foley informed his boss that Foley's new supervisor was under FBI investigation for embezzlement, his boss responded by firing Foley. Foley sued his former employer for wrongful discharge. Although the response of Foley's employer may seem reprehensible enough to lead to an award of punitive damages, Foley was only awarded those damages which he could claim under an action for breach of contract.<sup>1</sup>

On December 29, 1988, the California Supreme Court held that tort remedies are not available for the breach of an implied covenant of an employment contract.<sup>2</sup> The Court also held that Foley did not establish a breach of public policy by the employer, which would have entitled Foley to tort damages.<sup>3</sup> The Court did not determine whether a claim based upon breach of a public policy is limited to those policies derived from statutory or constitutional provisions. Additionally, the court did not state whether nonlegislative sources of public policy may serve as the basis for a claim of wrongful discharge.

In determining that a breach of the implied covenant of good

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1. See *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

2. *Id.* at 693, 765 P.2d at 396, 254 Cal. Rptr. at 234.

3. *Id.* at 670-71, 765 P.2d at 380, 254 Cal. Rptr. at 218; see also *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

faith and fair dealing does not give rise to tort damages for breach of an employment contract, the court stated that a "special relationship," such as that between an insurer and an insured, does not exist in most employment contracts.<sup>4</sup> The Court based its opinion on the theory that an employment relationship involves equal bargaining power, an element which is lacking in insurance contracts. Additionally, the impact of a breached employment contract is less drastic than when an insurance company refuses in bad faith to pay a claim.<sup>5</sup> The Court held that the employment relationship is "fundamentally contractual," and contractual remedies should remain the sole available relief for breach of the implied covenant of good faith and fair dealing in the employment context.<sup>6</sup> A likely result of the *Foley* decision will be a dramatic decrease in the amount of claims brought for wrongful discharge. Although a terminated employee may still claim tort damages resulting from an employer's public policy violations, and traditional contractual remedies are still available, attorneys may hesitate to advance these claims because of *Foley* and the possibility of future limitations facing the wrongfully terminated employee.

*Wrongful Employment Termination Practice* is a book published as part of the educational program sponsored by the Board of Governors of the State Bar of California and the Regents of the University of California, through the organization, California Continuing Education of the Bar. The Book was created for "both the newcomer and the skilled practitioner in the field of wrongful employment termination."<sup>7</sup> The book includes statutory and common law theories for recovery following termination, remedies for all forms of wrongful termination, defenses to wrongful termination claims, and litigation strategies for plaintiffs and defendants. The authors discuss attorney's fees, advise employers on how to avoid lawsuits, and briefly mention the tax consequences of a wrongful discharge claim.

The practitioner may wonder whether this book is still useful after the *Foley* decision. Although *Foley* limits recovery for plaintiffs, this book includes discussion of many other issues that currently involve employment termination. The book is designed to show an employer how to avoid trouble as well as how to remedy problems. The

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4. *Foley*, 47 Cal. 3d at 692-93, 765 P.2d at 395-96, 254 Cal. Rptr. at 233-34.

5. *Id.* at 692, 765 P.2d at 396, 254 Cal. Rptr. at 234.

6. *Id.* at 696, 765 P.2d at 398, 254 Cal. Rptr. at 236.

7. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *WRONGFUL EMPLOYMENT TERMINATION PRACTICE* XI (1987).

book helps an attorney with the decision whether or not to file a claim, as well as how to draft a complaint and litigate the case. Additionally, *Wrongful Employment Termination Practice* contains enough general information on the practice of law which makes it potentially useful for practitioners wholly uninvolved in employment cases.

The book begins with the historical background of wrongful termination law. The authors discuss the concept of "employment at will," and the evolution of this concept through statutory and case law.<sup>8</sup> Although California law currently recognizes at-will employment relationships, these relationships have deteriorated through the advancement of unions and legislative actions such as Title VII of the Civil Rights Acts of 1984,<sup>9</sup> the Age Discrimination Employment Act of 1967,<sup>10</sup> the Rehabilitation Act of 1973,<sup>11</sup> the Fair Labor Standards Act of 1938,<sup>12</sup> and the California Fair Employment Housing Act.<sup>13</sup>

When an attorney considers filing a wrongful termination claim, Chapter Two will help determine what possible theories upon which he or she may base a claim, what the consequences are of pursuing certain causes of action, and what remedies will be available for each cause of action.

The authors discuss the concept of wrongful discharge: "The term wrongful discharge is often used broadly, perhaps too broadly to describe all common law exceptions to at-will employment. Properly used, the term refers to a separate and distinct common law tort that occurs when an employee is terminated for reasons that violate the state's public policy."<sup>14</sup> Hence, the authors inform the attorney that "wrongful termination," or "wrongful discharge," is not a conglomerate of statutory and common law causes of action, but a com-

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8. California Labor Code section 2922 states that an employment relationship, having no specific term, may be terminated at the will by either party, upon notice to the other. CAL. LABOR CODE § 2922 (West Supp. 1989).

9. Title VII prohibits discriminatory employment practices based on race, color, national origin, religion or sex. 42 U.S.C. §§ 2000(e)(1)-2000(e)(17) (1982 & Supp. IV 1986).

10. This act prohibits discriminatory employment practices based on age. Age Discrimination Employment Act, 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986).

11. This act prohibits discrimination based on physical handicap. 29 U.S.C. §§ 701-796 (1982 & Supp. IV 1986).

12. *Id.* §§ 201-219 (1982 & Supp. IV 1986).

13. This legislation prohibits California employers from discriminating against employees on the basis of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex. CAL. GOV'T CODE §§ 12900-12996 (West 1980 & Supp. 1989).

14. *WRONGFUL EMPLOYMENT TERMINATION PRACTICE*, *supra* note 7, § 2.32, at 39.

mon law tort, developed from contractual principles involving public policy violations.

California first recognized an exception to the at-will employment doctrine after a termination which violated public policy in *Petermann v. International Brotherhood of Teamsters*,<sup>15</sup> where an employee was terminated for not committing perjury. However, the court could not clearly define public policy. Courts have yet to formulate such a definition.

The authors call *Tameny v. Atlantic Richfield Co.* "a significant catalyst for the increase in unjust dismissal cases in the 1980's."<sup>16</sup> In *Tameny*, the plaintiff alleged that he was fired for refusing to participate in an employer's illegal scheme to fix retail gasoline prices. The Court found that a cause of action for wrongful discharge is based upon social policies, not the agreement between the employer and the employee.<sup>17</sup> Therefore, refusal to participate in an employer's illegal activity is not good cause for dismissal.

The authors emphasize that "every published decision that recognizes a cause of action cites public policy found in a criminal or an employee rights statute."<sup>18</sup> However, case law has not yet limited causes of actions for public policy violations to specific statutory violations.<sup>19</sup>

The authors also discuss how exclusive statutory remedies preempt the common law causes of action.<sup>20</sup> These preemption issues are extremely important when the practitioner is first drafting a complaint. If statutory causes of action and causes of action based on common law wrongful discharge are included in the same complaint, the attorney drafting the complaint may lose the common law causes of action based upon preemption, and may hurt his or her client's right to receive a full recovery.<sup>21</sup>

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15. 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959).

16. WRONGFUL EMPLOYMENT TERMINATION PRACTICE, *supra* note 7, § 2.33, at 39.

17. WRONGFUL EMPLOYMENT TERMINATION PRACTICE, *supra* note 7, § 2.33, at 39 (citing *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 176, 610 P.2d 1330, 1337, 164 Cal. Rptr. 839, 844 (1980)).

18. WRONGFUL EMPLOYMENT TERMINATION PRACTICE, *supra* note 7, § 2.34, at 41.

19. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 669, 765 P.2d 373, 379, 254 Cal. Rptr. 211, 217 (1988).

20. WRONGFUL EMPLOYMENT TERMINATION PRACTICE, *supra* note 7, § 2.35, at 42-44.

21. In age discrimination cases pursuant to the FEHA "[w]here a new right is created by statute, the party aggrieved by its violation is confined to the statutory remedy if one is provided . . . ." *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.*, 65 Cal. App. 3d 121, 131, 135 Cal. Rptr. 192, 197 (1976). A FEHA sex discrimination claim preempted a breach of employment contract and breach of the implied covenant of good faith

The authors state that employees' contracts will help overcome the at-will doctrine. Recent cases state that "an express or implied oral contract, whether or not supported by independent consideration, may protect an employee against termination without cause."<sup>22</sup>

A claim based upon breach of an implied in-fact contract continues to be popular for the wrongfully discharged plaintiff. In order to establish this implied in-fact contract, the court considers "the longevity of the employee's services and the existence of personnel policies limiting the employer's discretion to arbitrarily discipline or terminate the employee."<sup>23</sup>

The authors discuss the implied covenant of good faith and fair dealing extensively in this book. The law implies a covenant of good faith and fair dealing in every contract.<sup>24</sup> The book shows how the implied covenant of good faith and fair dealing arose in the employment context in *Cleary v. American Airlines, Inc.*<sup>25</sup> "The longevity of an employee's service, together with the express policy of an employer, operate as a form of estoppel, precluding any discharge of such employee by an employer without good cause."<sup>26</sup> The implied covenant mandates that neither party to a contract may do anything that will deprive the other of the benefit of the agreement.<sup>27</sup> The breach of this covenant is determined on a case by case basis and, until *Foley*, could lead to awards for pain and suffering, emotional distress and punitive damages.

The authors state that bad faith denial of the existence of a contract, as found in *Seaman's Direct Buying Service, Inc. v. Stan-*

and fair dealing in *Hudson v. Moore Business Forms*, 609 F. Supp. 467, 474 (N.D. Cal. 1985), *modified*, 836 F.2d 1156 (9th Cir. 1987). Additionally, the Employment Retirement Income Security Act of 1974 preempts common law causes of action for wrongful termination. See *Johnson v. Transworld Airlines, Inc.*, 149 Cal. App. 3d 518, 528, 196 Cal. Rptr. 896, 902-03 (1983); *WRONGFUL EMPLOYMENT TERMINATION PRACTICE*, *supra* note 7, §§ 2.35-2.44, at 43.

22. *WRONGFUL EMPLOYMENT TERMINATION PRACTICE*, *supra* note 7, § 2.38, at 45-46. See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 925 (1981); *Rabago-Alvarez v. Dart Indus., Inc.*, 55 Cal. App. 3d 91, 96, 127 Cal. Rptr. 222, 225 (1976);

23. *Pugh*, 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927; *WRONGFUL TERMINATION PRACTICE*, *supra* note 7, § 2.39, at 47.

24. *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984); *WRONGFUL TERMINATION PRACTICE*, *supra* note 7, § 2.40, at 48.

25. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *WRONGFUL TERMINATION PRACTICE*, *supra* note 7, § 2.40, at 49.

26. *Cleary*, 111 Cal. App. 3d at 456, 168 Cal. Rptr. at 729.

27. 1 WITKIN, *SUMMARY OF CALIFORNIA LAW, CONTRACTS*, § 743, at 674 (9th ed. 1973); *WRONGFUL EMPLOYMENT TERMINATION PRACTICE*, *supra* note 7, § 2.41, at 49.

*dard Oil Co.*<sup>28</sup> may be used to base a claim in any contractual employment relationship, regardless of its duration.<sup>29</sup> So, if an employer, in bad faith attempts to deny the existence of an employment contract, an employee may have a tort claim, in spite of *Foley*.

Good cause for termination is always a valid defense for an employer in any suit involving an unlawful discharge. Because "good cause" is such a vague and difficult standard to apply, the authors present some of the various standards of "good cause" for termination.<sup>30</sup> For instance, courts are not permitted to interfere with legitimate exercise of managerial discretion in cases in which the employee occupies a sensitive managerial or confidential position.<sup>31</sup>

Chapter Two also includes discussion of other common law theories for suing employers after termination. Such theories involve torts such as infliction of emotional distress, invasion of privacy, defamation, fraud and misrepresentation. These tort theories, however, will likely have limited application in employment disputes during the next few years.

Chapter Two serves as the book's most valuable chapter for the practitioner who wishes to familiarize himself or herself with the various theories of recovery. Additionally, this chapter aids law students who seek accurate statements of the laws involving wrongful discharge.

Chapter Three lists the relief available under each theory of recovery for wrongful termination and the authors discuss the remedies that are unique to employment termination litigation. This chapter includes charts which help determine the most appropriate remedies to seek when drafting a complaint.<sup>32</sup> Since the cause of action pursued often determines the remedies that a plaintiff may recover, a plaintiff's attorney must carefully scrutinize all options before electing which cause of action to pursue. Since *Foley* drastically limits the utility of common law wrongful discharge claims, practitioners will be more likely pursue the statutory causes of action under the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, and the Age Discrimination Act of 1967.

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28. 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

29. WRONGFUL EMPLOYMENT TERMINATION PRACTICE, *supra* note 7, § 2.44, at 53.

30. WRONGFUL EMPLOYMENT TERMINATION PRACTICE, *supra* note 7, §§ 2.48-2.49, at 54-55.

31. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917, 928 (1981); WRONGFUL EMPLOYMENT TERMINATION PRACTICE, *supra* note 7, § 2.49, at 55.

32. WRONGFUL EMPLOYMENT TERMINATION PRACTICE, *supra* note 7, § 3.2, at 68.

Chapter Four includes discussion of issues that plaintiff's counsel should consider from the time of initial contact with a client through the drafting of a complaint. The authors attempt to familiarize the reader with possible scenarios, and thereby help the reader evaluate an actual case, and its possibilities of success.

Although Chapter Four includes forms which appear to needlessly restate information,<sup>33</sup> the authors give valuable lessons, as well. They show how to spot a problem plaintiff, and discuss when contact with employees of the company may violate the law or the standards of ethical conduct. The authors discuss pleading different causes of action. They show how one can avoid demurrers and other defense motions before trial. If a practitioner considers the various procedures discussed in this chapter, then he or she may prevent a premature dismissal of the case.

In Chapter Five, the authors focus on representing the employer in wrongful termination cases. They advise specifically on how to review facts and analyze possible liability. They also discuss insurance coverage, procedures for removing a case to federal court, responsive pleadings, defenses, preemption of common law claims by state and federal statutes, and summary judgment motions. The chapter includes an example of a joint representation letter that could be used for the defense for any claim, not just a claim for wrongful termination.<sup>34</sup>

The authors give a long list of factors for determining possible employer liability.<sup>35</sup> However, the authors do not say why these factors are important, so these factors give little guidance to an employer who seeks counseling on how to avoid law suits.

In Chapter Six, the authors discuss pretrial discovery, emphasizing problems unique to employment litigation. This chapter includes checklists for interrogatory preparation, depositions and document production.

Chapter Seven gives a plaintiff's trial approach. The discussion includes pretrial preparation, outlines for opening and closing statements, and post-trial motions. While discussing post-trial motions, the authors state that a "motion for a directed verdict is not a prerequisite for making a motion for judgment notwithstanding the ver-

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33. See *WRONGFUL EMPLOYMENT TERMINATION PRACTICE*, *supra* note 7, § 4.9, at 112 (form letter to client).

34. *WRONGFUL EMPLOYMENT TERMINATION PRACTICE*, *supra* note 7, § 5.13, at 185-86.

35. *WRONGFUL EMPLOYMENT TERMINATION PRACTICE*, *supra* note 7, § 5.18, at 188-90.



dict.”<sup>36</sup> This statement clarifies how the law in California has evolved to allow this post trial motion without first preserving that right before jury deliberation.

The authors, in discussing arguments for trial, declare: “The clear cut public policy case provides perhaps the best opportunity to persuade the jury to award punitive damages.”<sup>37</sup> This statement hints to the plaintiff’s attorney that a claim of public policy violation is very important, since after *Foley*, punitive damages may still be recovered in these types of actions. If counsel can avoid arguments involving implied covenants, and focus his or her attention upon possible employer public policy violations, then full recovery for the plaintiff is likely.

Chapter Eight gives a trial approach from the defendant’s perspective in the same manner as the preceding chapter does from the plaintiff’s perspective. Included in this chapter are good techniques for drafting special verdict forms.<sup>38</sup>

Chapter Nine gives a discussion of attorney’s fees, including statutory requirements for filing and opposing attorney’s fees petitions. The authors provide much information on how to calculate fees. They minimally guide the practitioner on issues regarding awardable costs and expenses.

The authors state that there is no published case law dealing with attorney’s fees and costs pursuant to California’s Fair Employment and Housing Act.<sup>39</sup> Since publication of this book, one California case equates attorney’s fees and costs allowable under the Fair Employment and Housing Act to Title VII of the Civil Rights Act of 1964.<sup>40</sup>

Chapter Ten gives examples of what plaintiffs and defendants should consider before settling a case. Settlement is extremely important in wrongful employment termination practice, especially in the wake of *Foley*. Additionally, the techniques shown can be useful for any civil litigator, not just those involved in wrongful discharge cases.

Chapter Eleven advises employers on how to adopt effective personnel policies and develop guidelines for avoiding successful ac-

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36. WRONGFUL EMPLOYMENT TERMINATION PRACTICE, *supra* note 7, § 7.59, at 320.

37. WRONGFUL EMPLOYMENT TERMINATION PRACTICE, *supra* note 7, § 7.3, at 278.

38. WRONGFUL EMPLOYMENT TERMINATION PRACTICE, *supra* note 7, §§ 8.57-8.60, at 356-58.

39. WRONGFUL EMPLOYMENT TERMINATION PRACTICE, *supra* note 7, § 9.2, at 368.

40. *Stephens v. Coldwell Banker Commercial Group, Inc.*, 199 Cal. App. 3d 1394, 1405, 245 Cal. Rptr. 606, 612-13 (1988).

tions for wrongful termination. The authors discuss what an employer should do if an employee is exercising a legal right or is opposing an employer's unlawful activity. Although this advice may be too late for employers already involved in wrongful termination suits, it can help guide an employer's future policies and practices.

The Appendix of the book covers over four hundred pages and includes forms for the wrongful termination complaint, petitions for removal of the case to federal court, demurrers, production of document requests, motions for summary judgment, demand letters, settlement agreements, and trial briefs. These forms will prove useful for the litigator throughout the life of the action.

Despite some repetitive chapters, and a few seemingly inaccurate statements of law, the book offers valuable discussions involving all aspects of the wrongful termination case. It is aimed at the practicing attorney, yet provides insight for the student, as well. The book covers virtually all aspects of employment termination, and is most valuable for its insight into the present law of wrongful discharge. As a source for various forms, the book serves as a starting point for attorneys engaged in all types of civil litigation.

This book was written at a time when wrongful employment termination practice emerged as a lucrative area of law for the California attorney. Although *Foley* limits this practice somewhat, many aspects of employment law remain, thus requiring a practical guide such as this for attorneys interested in wrongful termination.

